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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CHUE VANG, Defendant and Appellant.	C058020 (Super. Ct. No. 05F11321)

APPEAL from a judgment of the Superior Court of Sacramento County, Eugene L. Balonon, Judge. Affirmed.

Diane E. Berley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette and Michael P. Farrell, Assistant Attorneys General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I, III and IV of the DISCUSSION.

An information accused defendant Chue Vang of violating Penal Code section 288, subdivision (b)(1)[1] (lewd and lascivious acts with a child under 14, accomplished by force, duress, or menace), on or about and between April 15, 2003, and December 31, 2004; the alleged victim was his niece A., aged six at the time of the offense. After trial, a jury convicted defendant of this offense. The trial court sentenced defendant to a state prison term of six years (the middle term).

Defendant contends: (1) The trial court denied defendant his rights to due process, fundamental fairness, and confrontation under the federal and state Constitutions when it found A. competent to testify. (2) The trial court deprived defendant of due process and a fair trial under the federal and state Constitutions by giving the jury the standard instruction on witness credibility (CALCRIM No. 226) and refusing defendant's proposed modification, which would have told the jury that it could reject A.'s account if she testified inaccurately even though she did not deliberately lie. (3) The trial court deprived defendant of due process, a fair trial, and the right to present a defense when it refused to allow defendant's medical expert to testify that A.'s 11-year-old

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[1] Undesignated section references are to the Penal Code.

brother was physiologically capable of raping her. (4) Cumulative error compels reversal.

In the published portion of the opinion, we conclude the trial court properly refused defendant's proposed modification of CALCRIM No. 226. In the unpublished portion, we reject defendant's other contentions of error. We shall therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution case

In 2003 and 2004, defendant and A. lived with the rest of their extended family in a three-bedroom house on Cedar Springs Way in Sacramento. The household also included A.'s father L. V., her mother N. L., her grandparents, her six siblings, and her other two uncles. Defendant slept either in the attached garage or in a trailer parked in the front yard. According to A., she slept in her parents' or grandparents' bedroom or in the living room on a sofa; other children in the family also usually slept in the living room on a sofa or on the floor. When she slept in her grandparents' bedroom, she shared a bed with her older brother J.

J., 13 years old at the time of trial, generally confirmed A.'s account of the sleeping arrangements in the house, but denied ever sharing a bed with A.; according to him, she shared a bed only with their younger brothers. J. had never seen defendant in the living room while the children were sleeping there, but J. was a heavy sleeper.

On October 28, 2003, A. and her mother visited Dr. Pira Rochaanayon, a family practitioner untrained in sexual assault examinations, because A. had experienced vaginal bleeding for three weeks. They told him that A. had fallen from a bicycle. Examining her vaginal area by sight and touch alone, Dr. Rochaanayon could not detect a hymen; however, she denied sexual abuse, and he did not report it.

A., who was nine years old at the time of trial, testified that she had had a bicycle accident before her molestation which caused vaginal injury and bleeding, but it was not nearly so painful as what defendant did to her. After falling asleep on the living room sofa one night, A. awoke to find defendant on the sofa behind her, as her brothers and sisters in the room continued to sleep soundly. Although it was fairly dark, she could see defendant's face during his assault; she also smelled him.[2] She tried to scream, but he put his hand over her mouth. Having taken off his pants, he forced her pants and underpants down to her knees with his other hand. Then he put his "private part" inside A.'s private part twice; the second time, he moved his body as he did so. She described the act as "rape," a word she had heard from other children at school. She could not escape because he had pinned her in place with his leg. She was

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[2] According to A., defendant smelled different from and worse than her other uncles.

finally able to make a "screeching noise," after which defendant stopped, put on his pants, and left, heading toward the garage.

The next morning and for several days afterward, A. experienced vaginal pain and bleeding. Seeing blood in her underpants before showering, she showed them to her parents and told them what had happened, even though she felt afraid to do so and afraid of defendant in particular. After this incident, A. saw Dr. Rochaanayon, but did not tell him about the rape.[3]

In May 2005, A.'s mother told the police about A.'s alleged rape.[4]

On June 9, 2005, when A. was seven years old, Melanie Edwards of the Sacramento MDIC interviewed her with the aid of a Hmong interpreter.[5] The videotape of the interview was played for the jury, which received a transcript. According to the transcript, A. said that her uncle raped her once and gave an account similar to her trial testimony.[6] She also said that she

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[3] At no time in her testimony did A. give dates for these events.

[4] According to A.'s mother, A. finally told her about the alleged rape only after A.'s mother had asked her persistently for a week.

[5] A. testified without an interpreter at trial.

[6] Some of the details of her story were confusing or apparently self-contradictory, however. For instance, she said that when she woke up the light was on, but later she said that nobody could see what was happening because it was night; she also said she knew it was her uncle because he wears glasses.

knew the difference between the truth and a lie and that it was bad to lie.

Cathy Boyle, a pediatric nurse practitioner at UC Davis Medical Center who has examined over 5,500 children in cases of suspected sexual assault and has testified as an expert witness around 390 times in Sacramento County, examined A. on June 10, 2005. (She received A.'s history after it had been taken by a social worker, but did not rely on it in forming her opinion.) A. had very little hymen, and none at all from the 5:00 to the 7:00 position. This was an abnormal finding for a child of her age. On a classification scale from one (normal) to seven (sexually transmitted disease), Boyle rated this case a five (healed hymeneal trauma). She could not date the injury because even injuries as significant as this heal within three weeks. However, it was consistent with forcible sexual molestation and with penetration by a large object.[7] It could have been caused by either a single penetrating act or multiple penetrating acts. It could not have been caused by an injury from a bicycle

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She said that she was sleeping on her back, but her uncle began his assault by getting on her back. She said she saw blood in her underwear before her uncle raped her; in response to the question whether breakfast comes before or after lunch, she said, "After lunch." The interviewer ultimately used anatomically correct dolls to facilitate the questioning.

[7] Boyle also found an external rash in A.'s genital area, which was not caused by a sexually transmitted disease. Boyle opined that because A. lacked hymeneal tissue, urine would leak into her underwear and the wet underwear would ultimately cause a skin irritation.

accident. The only other scenario capable of producing such damage would be childbirth.

Defense case

On the theory that defendant was being scapegoated for someone else's conduct, the defense called A.'s mother, N. L., to show that she had a grudge against defendant. Asked whether defendant had accused her of improperly receiving government funds, N. L. did not confirm or deny it, but said she had not done so. She admitted that she had been angry because he used the house's electricity for his trailer without paying for it.

The defense called A.'s father, L. V., to corroborate that N. L. had been angry about the electricity. L. V. also testified that defendant had spanked the children and A. had complained about it.

Sacramento Police Officer Paul Jacobs, who interviewed A. about the alleged molestation on May 29, 2005, in L. V.'s presence, testified that he ended the interview after 10 minutes because A. did not seem forthcoming or able to recall events independently of what L. V. had said about them.

Dr. James Crawford, medical director of the Center for Child Protection at Children's Hospital in Oakland, California, having reviewed the records in A.'s case, agreed with Cathy Boyle that A. had been sexually assaulted but disagreed that her

injuries could have resulted from a single incident.[8] He could not say what minimum number of incidents would have been needed, but he had never seen this degree of trauma produced by a single incident and most children with such injuries report multiple incidents.

In closing argument, defense counsel asserted that the jury should refuse to credit A.'s testimony, which was "a mess."[9] Counsel argued that A.'s parents had coerced or manipulated her into accusing defendant because they bore grudges against him and sought to protect the real molester, J.

DISCUSSION

I

Defendant contends that the trial court deprived him of due process, a fair trial, and his right of confrontation by ruling, over his objection, that A. was competent to testify.
The People reply: (1) defendant did not preserve this contention for appeal, and (2) A. met the standard for competency. We conclude the contention was preserved for appeal, but fails on the merits.

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[8] He also opined that A.'s external rash could not have been caused by leaking urine.

[9] In so arguing, counsel quoted some of the testimony we set out below in part I of the discussion.

Background

At the start of A.'s testimony, the prosecutor asked if she knew the difference between telling the truth and telling a lie. A. said: "No." When the prosecutor tried to ask the question differently, A. said: "I don't understand."

The prosecutor asked: "If I . . . put my hands on a table right now, would that be true or would that be a lie if I said I'm touching a table?" A. said: "That would be true." However, when the prosecutor then asked: "If I said your -- the color of your sweater is -- that you're wearing today is black, would that be true or a lie?", A. said: "I don't understand." The prosecutor asked what A. would say if her teacher asked her whether she had seen someone in her class take a pencil without permission; again A. said she did not understand.

A. said she was nine, but did not know what year she was born (although she knew her birthday). Asked if she would turn 30 on her next birthday, she said: "I don't know."

Asked whether she would tell a police officer that she had broken a window if she really had, she said: "Yes. . . . Because I need to tell the truth." She said it would not be the truth if she told the officer she did not break the window; however, she did not know what it would be. When asked: "Something that's not the truth?", she said: "No." She said it would be a good thing to tell the officer the truth, but did not know if it was a good thing or a bad thing not to tell the truth.

When asked: "Can we agree that when we're here today we're only going to talk about true things?", A. said: "I don't know either." Asked what she would say if the prosecutor asked a question to which she did not know the answer, she said: "I don't know." However, she answered, "Yeah" to the question "Can we agree that you're just going to talk to us about what you know today?"

Defense counsel asked to approach the bench. After an unreported conference, the trial court excused the jury.

Outside the jury's presence, the trial court questioned A. A. said that she understood what telling the truth means, but when the court asked: "What does that mean to you?", she replied: "It means -- I don't understand."

A. agreed that it would be true if the trial court said her sweater was pink and not true if the court said it was purple. She said she did not know if children got in trouble at school for not telling the truth; however, she got in trouble if she did not follow the rules. She understood it was a rule in the court that she had to tell the truth and that there would be a problem if she did not. Finally, she said she understood that when either attorney asked her questions, she had to tell the truth.

Defense counsel asked: "I think . . . you said that you didn't understand to tell the truth. Do you understand that or not?" A. said: "I don't understand." However, when asked: "Do or do not?", A. said: "Do."

Defense counsel asked whether A. knew what would happen if she did not tell the truth in court; A. replied: "No." Asked: "Do you think it would be good or bad or do you not know?", she said: "Do not know."

Defense counsel asked: "What do you think you would do here if I asked you a question or [the prosecutor] asked you a question and you didn't feel like you could tell us the truth, what would you do?" A. said: "I don't know." Asked: "Okay. Do you feel like you can tell the truth to every single question we ask?", A. said: "I don't understand."

The trial court asked if A. would promise to tell the truth if she knew the answer, no matter who asked the question. She said: "Okay." When the court repeated the question, she nodded. When the court asked: "Are you saying yes or no?", she said: "Yes."

Defense counsel asked if A. understood what would happen to her if she broke that promise; she said she did not know. However, the prosecutor then asked if A. had ever gotten in trouble for not telling the truth, and A. said: "Yes." A. knew that bad things happened to her when she did that, and thought that a bad thing would happen to her if she did that here. A. agreed with the prosecutor that she would "just talk about the true things today in here especially[]" and said she knew what the prosecutor meant by "just talking about true things."

Defense counsel asked: "What would you do if I asked you a really hard question and you just couldn't tell the truth, what

would you do?" A. replied: "I would tell someone to help me." Asked who, A. said: "Maybe the judge or somebody."

The trial court asked for argument. The prosecutor offered none. Defense counsel said: "I'll submit. I think it is very thin, but I'll submit."

The trial court found that A. was competent.

Defense counsel did not renew a competency objection to A.'s testimony during trial. At the close of cross-examination, however, counsel asked if A. had ever felt unsure about understanding a question because it was in English instead of Hmong; A. said: "I don't know." Finally, counsel asked: "Do you feel like you've understood what we have said here today?" A. replied: "A little, yeah."

Following the verdict, defendant moved for a new trial on the sole issue of A.'s incompetence. Citing A.'s MDIC interview, the hearing outside the jury's presence, and A.'s testimony, defendant asserted that A. was incompetent to testify under Evidence Code section 701, subdivision (a)(2), because she was "incapable of understanding the duty of a witness to tell the truth." Because, according to defendant, only A.'s testimony inculpated him, the evidence was insufficient to support the verdict and a new trial was required.

The People opposed the motion, noting: (1) A. had articulated her understanding that she needed to tell the truth, then clearly testified that defendant raped her; (2) the medical evidence supported her testimony.

After hearing argument, the trial court denied the motion, stating: "The Court recalls the questions and answers between this witness and [counsel], and there was a point where the Court actually removed the jury so that the Court could satisfy itself by questioning A[.] to ensure that she was competent, and at the conclusion of that, I felt that she was competent to testify, and that's why I permitted her to remain on the stand and be questioned throughout the course of your examinations . . . , so I was satisfied at that time that she was competent. I don't find that there's anything here that would change my mind about that."

Analysis

"In general, every person, irrespective of age, is qualified to be a witness. (Evid. Code, § 700; *People v. Dennis* (1998) 17 Cal.4th 468, 525[].) A witness is disqualified from testifying only if he or she is incapable of expressing him[-] or herself so as to be understood, or is incapable of understanding the duty of a witness to tell the truth. (Evid. Code, § 701, subd. (a); *People v. Anderson* (2001) 25 Cal.4th 543, 572-573[]; *People v. Mincey* (1992) 2 Cal.4th 408, 444[].) The party challenging the witness bears the burden of establishing lack of competence. (*People v. Anderson, supra*, at p. 573; *People v. Dennis, supra*, at p. 525.) Whether a witness has the capacity to communicate and an understanding of the duty to testify truthfully is a preliminary fact to be determined exclusively by the trial court, whose determination will be

upheld absent a clear abuse of discretion. (*People v. Anderson, supra*, at p. 573.)" (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1368.)

The People assert that defendant abandoned the issue when counsel, rather than arguing, said: "I'll submit it. I think it is very thin, but I'll submit." (Cf. *In re S.C.* (2006) 138 Cal.App.4th 396, 420.) We disagree.

In *In re S.C.*, *supra*, 138 Cal.App.4th 396, we held that an appellate claim of a minor's incompetence was forfeited because counsel had not shown by record citation that a competence objection was raised below. (*Id.* at p. 420.) But here, the record (to which appellate counsel has appropriately cited) inferentially shows that trial counsel raised a competence objection in the unreported bench conference which led to the in camera hearing. Counsel's submission of the issue without argument did not abandon it: counsel could reasonably have decided that since the Evidence Code strongly presumes witnesses' competence and the hearing had exhaustively probed the issue, argument would be pointless. (By raising the issue at that stage, though, counsel laid the groundwork for her subsequent new trial motion.)

Thus, we find that defendant's contention was preserved for appeal. On the merits, however, it fails.

When a witness's competence is challenged, the trial court must determine competence as a preliminary fact before allowing the witness to testify. (Evid. Code, § 405; *People v. Liddicoat*

(1981) 120 Cal.App.3d 512, 514-515.) As noted, the burden of proving incompetence rests on the challenger. (*People v. Roberto V., supra*, 93 Cal.App.4th at p. 1368.) The determination of the issue rests within the trial court's sound discretion. (*Ibid.*) The trial court properly exercised its discretion here.

Although A. was relatively young and showed some difficulty (linguistic or otherwise) in understanding and answering questions, these are not sufficient grounds to find incompetence. Many witnesses younger than A. have been held competent to testify. (*People v. Roberto V., supra*, 93 Cal.App.4th at pp. 1368-1369, and cases cited.) And even if some questions at the hearing confused her, it became clear that A. understood the difference between the truth and a lie and her duty to tell the truth. Thereafter, she consistently testified that defendant and no one else assaulted her and supported her story with abundant circumstantial detail. Any inconsistencies or contradictions in her testimony went to credibility, not competence.

In short, the trial court's ruling that A. was competent to testify did not deprive defendant of due process or a fair trial, and his assertion that the ruling deprived him of his right to confrontation is not meritorious. By permitting A. to testify and face cross-examination, the court ensured that defendant could confront his accuser. If this confrontation led

A. into confusion or self-contradiction, that could only have helped defendant's case.

II

Defendant contends the trial court erred prejudicially by refusing his request to modify the standard instruction on witnesses' credibility. This contention lacks merit.

Background

The trial court proposed to give California Judicial Council Criminal Jury Instructions (CALCRIM) No. 226 (2006) as follows:

"You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's gender, race, religion, or national origin.[10] You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

"In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or

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10 The current version of this instruction omits the reference to specific biases or prejudices, reading simply: "You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have." (CALCRIM (2008) p. 58.)

accuracy of that testimony. Among the factors that you may consider are:

"How well could the witness see, hear, or otherwise perceive the things about which the witness testified?

"How well was the witness able to remember and describe what happened?

"What was the witness's behavior while testifying?

"Did the witness understand the questions and answer them directly?

"Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?

"What was the witness's attitude about the case or about testifying?

"Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?

"How reasonable is the testimony when you consider all the other evidence in the case?

"Did other evidence prove or disprove any fact about which the witness testified?

"Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

"If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.

"*If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.*" (Italics added.)

At the instructions conference, defense counsel requested the last paragraph be modified to read: "If you decide that a witness deliberately lied *or inaccurately testified* about something significant in this case[,] you should consider not believing anything that witness says. Or[,] if you think the witness lied *or inaccurately testified* about some things[,] but told the truth about others, you may simply accept the part that you think is true and ignore the rest." (Italics added.) As authority for this modification (said to derive from Forecite), counsel alluded to federal cases but did not cite any.[11]

After the prosecutor objected, the trial court refused the proposed modification, ruling that it clashed with the original paragraph's emphasis on deliberate lying and that the rest of CALCRIM No. 226 sufficiently covered other kinds of

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[11] Appellate counsel also does not cite the purported federal authority for this modification of the instruction.

inaccuracies. The court thereafter gave the jury CALCRIM No. 226 unmodified.

Analysis

Defendant contends that CALCRIM No. 226 as given did not fully and fairly inform the jury of his theory of the case: that A.'s testimony was incredible, not because she was deliberately lying but because "she did not fully understand the proceedings . . . or what it meant to tell the truth or tell a lie" or because she was "coached to tell a lie about [defendant]."[12] We are not persuaded.

In reviewing claims of instructional error, we look to whether the defendant has shown a reasonable likelihood that the jury, considering the instruction complained of in the context of the instructions as a whole and not in isolation, understood that instruction in a manner that violated his constitutional rights. (*People v. Smithey* (1999) 20 Cal.4th 936, 963; *People v. Warren* (1988) 45 Cal.3d 471, 487; *People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) We interpret the instructions so as to support the judgment if they are reasonably susceptible to such interpretation, and we presume jurors can understand and correlate all instructions given. (*People v. Guerra* (2006) 37

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[12] The second part of this argument misses the mark. If A. lied because she was "coached" to do so, she "deliberately lied," regardless of motive or influence. The instruction as given clearly covered that theory of the case.

Cal.4th 1067, 1148; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1112.)

In essence, defendant contends that the last paragraph of CALCRIM No. 226 should be modified as proposed here whenever there is evidence that a witness might have testified inaccurately for reasons other than mendacity or bad faith. This appears to raise an issue of first impression.[13] However, the paragraph of the instruction at issue generally corresponds to former CALJIC instruction No. 2.21.2 (witness willfully false; cf. CALJIC (Fall 2006 ed.) p. 53) and its predecessor, former CALJIC instruction No. 2.21, which have received ample judicial construction.[14] Therefore we turn to case law construing the former instructions for guidance.

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[13] *People v. Ibarra* (2007) 156 Cal.App.4th 1174 and *People v. Anderson* (2007) 152 Cal.App.4th 919 have upheld CALCRIM No. 226 against other challenges, as the People point out, but they do not address the point defendant raises now.

[14] Former CALJIC instruction No. 2.21.2 read as follows:

"A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars."

Before 1988, former CALJIC No. 2.21 included this instruction along with the following instruction on discrepancies in testimony: "[D]iscrepancies in a witness's testimony or between [a witness's] testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common

It is well settled that former CALJIC instruction No. 2.21.2 (and its predecessor, former CALJIC No. 2.21) correctly stated the law. (See, e.g., *People v. Carey* (2007) 41 Cal.4th 109, 130; *People v. Beardslee* (1991) 53 Cal.3d 68, 94; *People v. Turner, supra*, 50 Cal.3d 668, 698-699.)

The former instruction's purpose was to "set[] out a commonsense principle for evaluating witness credibility." (*People v. Murillo* (1996) 47 Cal.App.4th 1104, 1108.) Specifically, it told jurors that "if they [found] that a witness willfully lied in one material part of his testimony[] [t]hey [might] reject the whole testimony of such a witness, but they [were] not required to. They [might] nevertheless believe the remainder of the witness's testimony if they [found] the probability of truth favor[ed] his testimony in other particulars." (*People v. Reyes* (1987) 195 Cal.App.3d 957, 965.)

The last paragraph of CALCRIM No. 226 serves the same purpose as former CALJIC No. 2.21.2. Like the former instruction, it tells the jurors that if they find a witness lied about a material part of his testimony, they may but need not choose to disbelieve all of his testimony. Furthermore, if

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experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to trivial detail should be considered in weighing its significance." The 1988 revision of CALJIC divided the substance of former CALJIC No. 2.21 into Nos. 2.21.1 and 2.21.2. (*People v. Turner* (1990) 50 Cal.3d 668, 698, fn. 15.)

they find that though he willfully lied on one point he told the truth on others, his lie on the former point does not bar them from believing the rest. Thus, like former CALJIC No. 2.21.2, the last paragraph of CALCRIM No. 226 aims specifically, and only, to address deliberate lying on the stand.

Defendant's proposed modification of CALCRIM No. 226 would have misstated the law. CALCRIM No. 226 allows the jury to disbelieve a witness who deliberately lies about something significant because experience has taught us that a deliberate liar cannot be trusted. The same is not true of a witness who is merely mistaken at some points in her testimony. Defendant cites no authority for the proposition that a witness's mere inadvertent inaccuracy on any significant point should prompt a jury to disbelieve his entire testimony, which is plainly at odds with the earlier portion of CALCRIM No. 226, and we know of no such authority. Indeed, it is hard to see how any jury could ever decide any case if it thought it could accept only the testimony of witnesses who had committed no inaccuracies. This is particularly true of cases in which children are witnesses, because their use of language is not fully developed.

Furthermore, CALCRIM No. 226 addresses credibility questions other than deliberate lying in its earlier paragraphs, which generally correspond to two former CALJIC instructions: Nos. 2.20 (believability of witnesses) and 2.21.1 (discrepancies in testimony). (CALJIC (Fall 2006 ed.) pp. 48-49, 52.) As we shall explain, this portion of CALCRIM No. 226 sufficiently

educated the jury on how to assess inaccuracies caused by anything other than mendacity.

Tracking former CALJIC No. 2.20, CALCRIM No. 226 begins with a list of factors other than deliberate lying which the jury should consider in weighing the credibility of every witness, including the witness's capacity to perceive, remember, and describe events, his demeanor, his ability to understand and answer questions, his possible bias or prejudice (including that stemming from a personal relationship with someone involved in the case), his attitude about the case, any consistent or inconsistent past statements, and the reasonableness of his testimony in light of all the other evidence. Tracking former CALJIC No. 2.21.1, CALCRIM No. 226 then warns the jury against rejecting testimony merely because of inconsistencies or conflicts because witnesses frequently and innocently forget things or remember them differently from each other. In total, then, CALCRIM No. 226 -- prior to its final paragraph about deliberate lying -- covers every possible source of good faith inaccuracy in testimony and correctly informs the jury how to assess them.

Contrary to defendant's view, therefore, his proposed modification was unnecessary to inform the jury how to weigh the possibility that A.'s testimony was inaccurate for any reason other than deliberate lying. The unmodified instruction plainly told the jury to consider whether A. could perceive, describe, and remember events correctly; whether she could clearly convey

her version of events in response to questioning; whether her MDIC interview was inconsistent with her testimony; and whether her testimony was reasonable in light of all the other evidence. The instruction also alerted them to the possibility of improper influence from A.'s parents or anyone else personally involved in the case.

Thus, CALCRIM No. 226 as given fully covered the defense theory of the case. As we have indicated above, defense counsel's closing argument highlighted all of the relevant factors identified in the instruction. The instruction, together with counsel's argument, fully and fairly informed the jury as to defendant's theory of the case.

The trial court correctly refused defendant's proposed modification of CALCRIM No. 226.

III

Defendant contends that the trial court erred prejudicially by refusing to allow his medical expert, Dr. Crawford, to testify, in support of defendant's third party culpability theory, that an 11-year-old boy is physiologically capable of rape. The trial court did not err.

Background

During the redirect examination of Dr. Crawford, the following colloquy occurred:

"Q [by defense counsel]. And let me just ask you. The history that you get from female children that you speak to or

examine or that you read about, is the assault on them always by an adult male?

"[The prosecutor]: Objection, relevance.

"THE COURT: Sustained.

"[Defense counsel]: I'll ask it this way.

"Q. Physiologically would it be possible for a young person to cause these injuries that you see on A[.]?

"A. In the context of an assault?

"Q. Sure.

"Q. A boy as young as eleven?

"[The prosecutor]: Objection, facts not in evidence.

"THE COURT: Sustained.

"[Defense counsel]: It is possible [*sic*] or is it not, doctor, that a finger could have caused these injuries?

"A. Sure.

"[The prosecutor]: Objection. Facts not in evidence. Ask it be stricken.

"THE COURT: Sustained. It is stricken.

"[Defense counsel]: Can I be heard?"

After an unreported bench conference, defense counsel moved on to another subject.

Subsequently, the trial court and counsel memorialized on the record the prior bench conference and the court's ruling.

Defense counsel stated: "I sought from [Dr. Crawford] the following testimony[:] that in his expert opinion is an 11-year-old boy capable of having an erection. [¶] And I

solicited that so that the jury would be able to consider who the other potential perpetrators of these acts could be. Specifically, the people living in that house that were male [were L. V.], an adult, [B. V.], an adult, [N. V.], an adult . . . . [¶] There were . . . four sons of [L. V.] all of whom were older than J[.], and so . . . the jury didn't need any expert testimony to determine whether or not these people could be potential culprits. [¶] But with J[.], they would need expert testimony to understand whether or not he could have used his penis in some way to cause the injury to A[.] And the Court I believe granted or sustained [the prosecutor]'s objection."

The trial court explained that it had sustained the objection because it felt the question posed as a hypothetical was not supported by any prior evidence. Defense counsel replied that the prior evidence supporting the question was that J. was a potential perpetrator because he lived in the same house and slept in the same bed as A. The trial court stated that there was no evidence A. had implicated J. in the crime, and the fact that J. had access to her was not enough to support a third-party culpability defense. (The court noted, however, that counsel could properly argue that if A. was molested repeatedly, as Dr. Crawford opined, some explanation of her injuries other than a single attack by defendant would better fit the evidence.)

Analysis

Defendant contends that the trial court's ruling deprived him of his constitutional right to present a defense. We disagree. There is no constitutional right to present a defense unsupported by admissible evidence. Defendant's third party culpability theory was such a defense.

Only relevant evidence is admissible. (Evid. Code, § 210; *People v. Morrison* (2004) 34 Cal.4th 698, 724.) To be relevant and therefore admissible, "evidence of third party culpability must be capable of raising a reasonable doubt of the defendant's guilt; 'there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.'" (*People v. Davis* (1995) 10 Cal.4th 463, 501, quoting *People v. Hall* (1986) 41 Cal.3d 826, 833.) Evidence of opportunity or motive, without more, is insufficient. (*People v. Yeoman* (2004) 31 Cal.4th 93, 140; *People v. Hall, supra*, 41 Cal.3d at p. 833.) The trial court's decision to admit or exclude evidence offered to prove third party culpability is reviewed for abuse of discretion. (*People v. Yeoman, supra,* 31 Cal.4th at pp. 140-141; *People v. Lewis* (2001) 26 Cal.4th 334, 372-373.)

Here, as the trial court found, defendant offered no evidence linking J. to the crime. The only evidence counsel cited to justify eliciting an opinion about the sexual maturity of an 11-year-old boy was that J. sometimes slept in the same bed as A. Even assuming the jury believed A.'s testimony on that point rather than J.'s contrary testimony, that is mere

evidence of opportunity, which is insufficient to support a third party culpability defense. (*People v. Yeoman, supra*, 31 Cal.4th at p. 140; *People v. Hall, supra*, 41 Cal.3d at p. 833.) The trial court therefore correctly sustained the prosecutor's objection to this line of questioning.

Defendant's invocation of the constitutional right to present a defense does not assist him. "'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'" (*People v. Jones* (1998) 17 Cal.4th 279, 305, quoting *People v. Hall, supra*, 41 Cal.3d at p. 824.) The first rule of evidence is relevance. Evidence that 11-year-old boys in general can have erections (assuming Dr. Crawford would have so testified) and that J. sometimes shared A.'s bed, without more, had no tendency in reason to link J. to the crime. Therefore, the application of the ordinary rules of evidence to exclude the proposed opinion testimony as irrelevant did not infringe impermissibly on defendant's right to present a defense.

Defendant has shown no error on this issue.

IV

Lastly, defendant contends that cumulative error compels reversal. As we have found no error, we reject this contention.

DISPOSITION

The judgment is affirmed.

SIMS, J.

We concur:

BLEASE, Acting P. J.

RAYE, J.